

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

**FIBER SYSTEMS INTERNATIONAL,
INC.,**

Plaintiff,

vs.

APPLIED OPTICAL SYSTEMS, INC.,

Defendant.

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CIVIL ACTION NO. 2-06-CV-473

**FSI'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE
DEFENDANT'S ORIGINAL ANSWER AND COUNTERCLAIM TO
PLAINTIFF'S SECOND AMENDED ORIGINAL COMPLAINT**

Fiber Systems International, Inc. ("FSI") files this Reply ("Reply") in Support of Its Motion ("Motion") (Docket No. 287) to Strike Defendant's Original Answer and Counterclaim to Plaintiff's Second Amended Original Complaint and shows:

1. Applied Optical Systems, Inc.'s ("AOS") Response ("Response") (Docket No. 306) in Opposition to FSI's Motion contorts this Court's Order and Local Rules to limit the Court's discretion over its docket. Such an interpretation cannot stand.
2. On September 30, 2009, AOS withdrew its opposition to FSI's Motion for Leave to File its Second Amended Original Complaint, and included a proposed Order (Docket No. 278), which requested "that Plaintiff Fiber Systems International, Inc.'s Second Amended Original Complaint for Patent Infringement [doc. 229-2] **is deemed filed.**" (emphasis added).
3. Over AOS' plea, the Court carefully: "GRANT[ED] the Motion and [held] FSI **is permitted to file** its Second Amended Original Complaint." See Docket No. 279 (emphasis

added). AOS, however, ignores the clear language of the Court's order and instead suggests that Local Rule CV-7 prohibits the Court from issuing such a ruling.

4. In particular Local Rule CV-7 provides in relevant part:

(k) Motions for Leave to File. With the exception of motions to exceed page limitations, motions for leave to file a document must be accompanied by the document sought to be filed. The motion and document should be filed separately. **If the motion for leave to file is granted, the document will be deemed to have been filed as of the original date of its filing.** If the motion is denied, the previously filed document will be stricken.

5. According to AOS' logic, the Court's options with respect to Motions for Leave to File are to either (1) grant the motion and deem the same entered or (2) deny the motion and strike it from the pleadings. Such a rigid interpretation of the Local Rules, however, not only attempts to limit the Court's power, it fails to serve the basic tenant that a trial Court has broad discretion over its docket, and the grant or denial of motions for leave to amend the pleadings, as justice so requires. *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594 (5th Cir. 1981); *Smith v. EMC Corp.*, 393 F.3d 590, 596 (5th Cir. 2004). Contrary to AOS' position, the Court must have discretion and flexibility to rule as it desires with request to Motion for Leave to File including, but not limited to, the granting a motion for leave to file an amended complaint without having deemed entered the underlying amended complaint.

6. Further AOS's veiled attempt at correcting its deficient pleadings on the eve of trial must not be permitted, particularly, where AOS has argued three months earlier with respect to FSI's Motion for Leave to amend its pleadings that "[i]t is simply too late in the day to so dramatically alter the scope of this lawsuit." Docket No. 242, page 2. Indeed, through its newly filed Answer and Counterclaim, this is exactly what AOS attempts to do. The Answer and

Counterclaim inject brand new factual allegations and claims which it would otherwise have been prohibited from alleging at trial.

WHEREFORE, FSI requests that the relief sought in its Motion to Strike AOS' Original Answer and Counterclaim be granted in full.

Dated: October 20, 2009.

Respectfully submitted,

GREENBERG TRAURIG, LLP

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***ATTORNEYS FOR PLAINTIFF
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on this 20th day of October, 2009. Any other counsel of record will be served by facsimile transmission and first class mail.

/s/ Peter S. Wahby
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